CALCUTTA HIGH COURT

Abhoy Kanta Gohain

Vs.

Gopinath Deb Goswami

(Pal, J.)

18.08.1942

JUDGMENT

Pal, J.

1. This appeal is by defendant 1 in a suit for declaration that the transactions referred to in the plaint related to the property described in Schedule 'Kha' of the plaint and that the plaintiff thereby acquired title to this property though the description given thereof in the several documents was inadequate. The plaintiff also prays for rectification of the relevant documents and for possession of the property on partition by metes and bounds. The property which the plaintiff now claims as having been the real subject-matter of the several transactions is entered in the General Register of Revenue Free Estates in the Assam Valley Districts as serial No. 4, No. 10 of 1863-64 Bamuni Grant, situated in Thana Sadar, Mouza Mikir Bamuni. A certified copy of an extract from the General Register is Ex. 10 in this case. In the present plaint this property is given in Schedule 'Kha' and there it is described as 78.68 acres out of revenue free (F.S.) land measuring 238 acres 3 karas belonging to the share of the defendant and included in F.S. Grant Serial No. 4, Grant No. 10 appertaining to 'Mikir Bamuni Grant' Kismat in Mauza 'Chalchali' District Nowgong.

2. The plaintiff's case is (1) that first in 1919 and then again in 1923, defendant 1 gave this property along with others in mortgage to him to secure repayment of loans of ₹ 5000/- and ₹ 3,300/- respectively, (2) that in the mortgage deeds this property was described as 238 acres 3 karas of land included in Bamuni Fee Simple Grant No. 4 of Chalchali Mauza in District Nowgong within the jurisdiction of police station Chamaguri and Sub-Registry Nowgong, (3) that on 10th April 1929 all the properties covered by the two mortgages referred to above were sold by defendant 1 to the plaintiff at the price of ₹ 15,000/-, (4) that in the sale deed the descriptions of the properties including the property now in dispute were copied from the mortgage deeds, (5) that on 22nd November 1931, the plaintiff instituted the Title suit No. 20 of 1931 in the Court of the Subordinate Judge, Nowgong, Assam Valley Districts, for recovery of possession of the properties thus purchased by him in, 1929, (6) that in the plaint of that suit the description of the properties was taken from the sale deed of 1929 and thus in it the present property was described as 238 acres 3 karas of land in the share of defendant 1 and now in his possession out of the lands included in serial No. 4 Bamuni Fee Simple Grant No. 10 in Mauza

Chalchali, (7) that the suit was decreed in favour of the plaintiff on 15th December 1933 and in the decree this property was described as in the plaint of that suit; (8) that in course of the proceedings in execution of this decree, the Amin who went to deliver possession of the decretal properties reported that the property pointed out in the locality as corresponding to the above description was situated in Mikir Bamuni Grant Kismat, but that the description given in the decree was inadequate to identify the decretal land with this property in the locality, (9) that the executing Court ordered delivery of possession of this land in Mikir Bamuni Grant, Kismat as the decretal land; (10) that on appeal by defendant 1 the learned District Judge held that as the description of the property given in the decree was inadequate to identify the decretal land with the land in Mikir Bamuni Grant Kismat, it was beyond the competence of the executing Court to enquire and decide if this was the real subject-matter of the decree and of the antecedent transactions, and that for the deter, mination of this question the only course-left to the decree, holder was to have recourse to a suit in a proper Court; (11) that delivery of possession of the property was thus refused by the appellate Court on 24th ' August 1986 on this ground of want of jurisdiction; and (12) that this order of the appellate Court was ultimately confirmed by the High Court on 17th May 1937.

3. The plaintiff, therefore, instituted the present suit on 29th May 1939 with the above allegations for the reliefs stated above. The present appellant appeared and filed a written statement alleging inter alia that the land as described in the decree in Title Suit No. 20 of 1981 and in the antecedent transactions was a different property distinct from the land now claimed in the present suit and that all the antecedent transactions and the above decree related not to the land now claimed but to the other land correctly and adequately described in the decree and in the various other documents referred to in the plaint. The learned Additional Subordinate Judge held that there was no necessity for the rectification of the several documents mentioned in the plaint and of the decree in Title Suit No. 20 of 1981 and consequently dismissed the plaintiff's claim for rectification of these documents. As regards the rest of the case of the plaintiff, the learned Judge decreed the suit finding that defendant 1 had no property at Bamuni village satisfying the description given in the several documents named in plaint and that all the transactions and the decree in the Title Suit No. 20 of 1981 related to the land described in Schedule 'Kha' to the present plaint. It is no longer disputed that all the transactions beginning with the mortgage of 1919 and ending with the decree in Title Suit No. 20 of 1931 were intended by the parties to relate, and purported to refer to the land of which the possession was delivered to the plaintiff by the Amin in Title Execution case No. 5 of 1935 and which is now described in Schedule Kha to the present plaint and is covered by the entry in the General Kegister of Be venue Free Estate in the Assam Valley Districts excluding Goal-para, a certified copy of the extract from which is Ex. 10 in this suit.

4. Mr. Mukherji appearing in support of the present appeal urges the following points : (1) That in view of the finding arrived at by learned Additional Subordinate Judge that the descriptions of the property given in the decree of Suit No. 20 of 1931 were not wrong, the present suit is barred by Section 47, Civil Procedure Code (2) That even assuming that there were errors in the description of the property in the several documents including the decree in Suit No. 20 of 1931, it was within the competence of the Court executing that decree to enquire and decide what was the real subject-matter of the decree and consequently the present suit is barred by Section 47, Civil Procedure Code (3) That, as a matter of fact, the decree in Suit No. 20 of 1931 was construed in the proceeding in execution of that decree by the District Judge and by the High

Court as comprising lands other than the land claimed in the present suit, and not comprising the present land; consequently the question is barred by res judicata. (4) That the relief claimed is not available to the plaintiff without rectification of the decree and the antecedent documents and that the relief by way of rectification of these documents having been refused by the Court below and there having been no appeal by the plaintiff from this part of the decree dismissing his claim for rectification, the decree granting the other reliefs given to the plaintiff cannot be allowed to stand. (5) That the relief claimed in the present suit being founded on the ground of mistake, and the alleged mistake having been detected to the knowledge of the plaintiff by the Ameen in the execution case No. of 1935 on 10th September 1935, the present suit is barred by limitation, having been instituted on 29th May 1939, beyond three years from the date when the mistake became known to the plaintiff.

5. In order to appreciate the first point, urged by Mr. Mukherji the decision of the learned Judge on issues 16 to 19 will be a pertinent-consideration. These issues stand thus:

> (16) Whether by mistake the suit lands were wrongly described and entered in the mortgage deeds and subsequently in the plaint in Title Suit No. 20 01 1931 and carried in the decree as alleged in the plaint? (17) Whether there were any mistakes common to both parties regarding the suit lands as alleged in the plaint 1(18) Whether the plaintiff has any right, title and interest in the land in suit 1(19) Whether defendant 1 has any other grant as Bamuni Fee Simple Grant other than the one in suit, i.e., Mikir Bamuni Fee Simple Grant, Serial g No. 4, Grant No. 10 as alleged in the plaint?

6. All these issues have been decided in favour of the plaintiff and it has been found that before the transactions commenced and in course of the negotiation for the first of the series of transactions the plaintiff and defendant 1 went to the locality to inspect the land of the Grant and it was the land which is the subject-matter of the present suit which they inspected. It is, therefore, not a case of mistake as to the identity of the property itself which formed the subject-matter of the several transactions, but of an inadequate description or a mis-description, of it in the written instruments and consequently in the decree in T.S. No. 20 of 1931. The finding of the learned Judge is that the description of the property in the relevant instruments was not wrong but somewhat inadequate. The description given in the decree in T.S. No. 20 of 1931 and in the antecedent instruments, taken with the fact now established by evidence that defendant 1 has no other grant bearing No. 10 and serial No. 4 at Bamuni village other than the Mikir Bamuni Grant No. 10 bearing serial No. 4, suffices to identify the subject-matter of these transactions and of the decree with g the land in dispute in the present suit. This very inquiry, the result of which now clarifies the description of the property given in the decree and establishes the identity of the decretal land with the land in suit, was shut out in the execution proceeding by the learned District Judge and it was decided that such an enquiry was beyond the competence of the executing Court. After this decision inter partes, it is no longer open to the appellant to contend that this enquiry was within the competence of the executing Court and that consequently the present suit is barred by Section 47, Civil Procedure Code

7. The question raised in the present suit is, in substance, a question of construction of the decree in Title suit No. 20 of 1931 and Mr. Mukherji contends that such a question was for the executing Court to answer. In support of this contention Mr. Mukherji relies on *Julien Marrefc v. Mahomed Khaleel Shirazi & Sons*[1]. and *Nandi Lal v. Jogendra Chandra*[2] But, rightly or wrongly, it was

decided between these very parties in the previous execution case that the matter was not within the competence of the executing Court. This decision, even if erroneous, is binding between the parties. Even though it is a question of law, a decision on it, though erroneous, would operate as res judicata between the parties to it; *Tarini Charan v. Kedar Nath*[3], Correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata. This is really a rule whereby the consistency of judicial decision is maintained and it is needless to emphasise the importance of such consistency in the proper administration of justice. In support of the third point urged by him Mr. Mukherji refers us to the judgment of the High Court in the previous execution proceeding. This judgment is Ex. 9 in the present suit. We have gone through this judgment, and, there is nothing in it which points to any independent conclusion on the question of construction of the decree. It simply refers to the judgment of the Court of appeal below and affirms the same with the observation that there was no ground for second appeal. The judgment of the learned District Judge is Ex. 8 in the present case and as we have already observed, the learned Judge expressly refrained from entering into the question on the ground that such enquiry was beyond the competence of the executing Court.

8. As regards the fourth point urged by Mr. Mukherji, we do not see why the plaintiff cannot succeed without rectification of the several instruments of transfer including the decree. It has now been found that there was no mistake or misapprehension in the minds of either party as to the identity of the property itself which was to form the subject-matter of the transactions. The only difficulty in the way of the plaintiff that may arise from non-rectification of the instruments is the difficulty of proving that the transactions related to one property rather than the other. The matter having been reduced to the form of a document, the difficulty may arise in bringing in extrinsic evidence to clear up the defect, if any, in the description. It is not the case of anybody that the language used in the several instruments in describing the subject-matter, is on its face ambiguous or defective. The language used is plain in itself. But the description is somewhat unmeaning in reference to existing facts as there is no grant No. 10 in Mouza Bamuni. The description in so far as it mentions the serial No. I and the grant No. 10 applies to the land in Mikir Bamuni Grant Kismat which is the land in, the present suit, and in so far as it refers to "Bamuni Mouza" seems to apply to a differ-ent land. In our opinion, even without any rectification of this description, evidence is admissible to show to which of these two properties it was meant to apply. Such evidence has been given in this case and it has been established beyond doubt that the description was meant by either party to apply to the land which is the subject-matter of the present suit.

9. Coming now to the last point urged by Mr. Mukherjee, it must be said that the relief by way of rectification of the instruments as prayed for in the plaint was one ' on the ground of mistake. Article 96, Limitation Act, prescribes a period of three years for a suit for relief on the ground of mistake and this period is made to run from the date when the

[1] A.I.R. 1950 P.C. 86 at page 480 [3] AIR 1928 Cal 777 : (1929) ILR 56 Cal 723 : 115 Ind. Cas. 593
[2] A.I.R. 1923 Cal. 53 at p. 426

mistake becomes known to the plaintiff. It can hardly be denied that in this case, the mistake, if any, became known to the plaintiff on 10th September 1935 when the Ameen in his report pointed out the difficulty. As the present suit was instituted only on 20th May 1939, it was prima facie barred by limitation so far as this relief by way of rectification of the instruments was concerned. Mr. Sanyal appearing for the plaintiff-respondent contends that in computing the period of limitation for this purpose the plaintiff would be entitled to a deduction of the time

during which he had been prosecuting the execution case up to the High Court under Section 14(1), Limitation Act. The relief by way of rectification, however, has not been given, and we have decided above that the plaintiff can do without this relief. In this view, it is not necessary for us to say whether or not Section 14(1) of the Act would have been of any avail to the plaintiff so far as his claim to this relief is concerned. As regards the rest of the claim, the relief claimed is not founded on the ground of mistake. As has been pointed out above, it is not a case of mistake at all as to the identity of the property itself. The whole difficulty is about the adequacy or otherwise of the description of the property as expressed in the decree and in the several instruments. The suit, in substance, is for a declaration that the decree in Title Suit No. 20 of 1931 related to the present suit land and that the plaintiff acquired title to it by the sale of 1929 and by the above decree. There is not specific provision for such a suit in the Limitation Act, and, in our opinion, such a suit is governed by Article 120 of the Act. The earliest date when the cause of action for tin's suit can be said to have arisen is 10th September 1935, the date of the Ameen's report, and the suit was instituted well within the prescribed period from. that date.

10. Even if we accept the contention of Mr. Mukherjee that according to the case made in the plaint even claim to these other reliefs was based on the ground of mistake and consequently it is Article 98, Limitation Act, that shall govern also this part of the suit, the suit, in our opinion, will not be barred by limitation. So far as these reliefs are concerned, the plaintiff will, in our opinion, get the advantage of the provisions of Section 14, Limitation Act. The execution proceeding is a civil proceeding within the meaning of Section 14. It is not disputed that the plaintiff prosecuted that proceeding with due diligence. As has been pointed out above, Mr. Mukherjee himself contends that there is at least some authority for saying that the relief now claimed by the plaintiff was properly available to him in the proceeding in execution of the decree in T.S. No. 20 of 1931. Consequently, it cannot be said that when the plaintiff pursued the matter in that proceeding there was any want of good faith. The Court in that proceeding thought that it was unable to entertain the claim, the matter being beyond the competence of the executing Court. In our opinion, all the elements are present for the application of the provisions of Section 14, Limitation Act, so far as this part of the plaintiff's case is concerned. The executing Court held that it was unable to entertain the claim for defect of jurisdiction in respect of it. Even if the first Court erroneously decided its inability, Section 14 would apply. In such a case it is not open to the second Court to say that there was no want of jurisdiction in the first Court. In the result all the contentions raised in support of the appeal fail and it is dismissed with costs, the hearing fee being assessed at three gold mohurs.

Mukherjea J.

11. I agree.

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